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No. 217.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

For the Seven-Up Bottling Company of Miami, Inc.

FRANK A. CONSTANGY,
MARION A. PROWELL,
1404 Candler Building,
Atlanta 3, Georgia,
ALBERT B. BERNSTEIN,
BERNSTEIN & HODSDON,
Seybold Building,
Miami, Florida,
Attorneys for Respondent,
Seven-Up Bottling Company of Miami, Inc.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Argument	3
A. The decree of the court below will result in a calculation of "back pay" so as to make the employees "whole" as the terms have been used and interpreted under the National Labor Relations Act without imposing a penalty	3
B. The order of the National Labor Relations Board prior to its modification by the court below would have been penal and not remedial	7
C. The petitioner seeks to impose upon respondent liability for collateral losses on the part of the employees, while denying the respondent credit for collateral benefits	9
D. The petitioner seeks approval of the right to impose a monetary penalty upon an employer who avails himself of his statutory right to judicial review under Section 10 (E) and (F) of the National Labor Relations Act	10
E. The decree of the Court of Appeals modifying the Board's order upon which enforcement was sought, so as to conform it to the evidence and the applicable law, was an appropriate exercise of the statutory authority vested in the Court under Section 10 (e) of the National Labor Relations Act	12

F. By re-enacting without modification the provisions of the original act relating to "back pay" in the 1947 amendments to the National Labor Relations Act, Congress must be assumed to have accepted the construction placed thereon by the Board and approved by the Courts 17

Conclusion 19

Appendix 21

Cases Cited.

American National Insurance Co. v. N. L. R. B., 72 S. Ct. 824, 96 L. Ed. 721 13

Brooklyn Savings Bank v. O'Neil, 324 U. S. 697 ..... 8, 18

Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 235-6 ..... 8, 13

In Re: F. W. Woolworth, 90 N. L. R. B. 289 4

In Re: Penn. Greyhound Lines, 1 N. L. R. B. 1 4

Nathanson v. N. L. R. B., ... U. S. ..., 97 L. Ed., Adv. P. 15, Dec. Nov. 10, 1952 7

N. L. R. B. v. Brashear Frt. Lines, 127 F. (2d) 198, 199-200, 6th Cir. 9

N. L. R. B. v. Fotill Products, Inc., 180 F. 2d 441, 444, 9th Cir. 8

N. L. R. B. v. Greenbaum Tanning Co., 110 F. 2d 988, 989, 7th Cir. (1940) 8

N. L. R. B. v. Gullett Gin Co., 340 U. S. 361, 363, 95 L. Ed. 337, 341, 342 ..... 4, 9, 13, 19

N. L. R. B. v. Marshall Field & Co., 129 F. 2d 169, 172, 7th Cir. 8

Phelps-Dodge v. N. L. R. B., 313 U. S. 177, 197, 198 ..... 7, 8, 13, 16, 18

Pittsburgh Steamship v. N. L. R. B., 180 F. 2d 731, 6th Cir., 340 U. S. 498 13

Reliance Mfg. Co. v. N. L. R. B., 125 F. 2d 311, 316, 7th Cir. 8
Republic Steel v. N. L. R. B., 311 U. S. 7, 9, 61 S. Ct. 77 ..... 4, 5, 8, 9, 13
Shell Oil Company v. N. L. R. B., 196 F. 2d 637 (June 17, 1952) 5
Social Security Board v. Nierotko, 327 U. S. 358, at Fn. 4, p. 360 ..... 5, 10
U. S. v. Missouri Pacific Ry., 218 U. S. 269, 280, 49 S. Ct. 133, 137 11
Universal Camera v. N. L. R. B., 340 U. S. 474 13
Virginia Electric & Power Co. v. N. L. R. B., 63 S. Ct. 1214, 1220, 319 U. S. 533, 544 ..... 8, 16

Statutes Cited.

Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. 136 2
61 Stat. 1360, 29 U. S. C. Sup. U. 151 4
28 U. S. C. 1254 2
29 U. S. Supp. V, Sec. 160 (c) 18

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OPINIONS BELOW.

The opinion of the Court below (R. 124-128) is reported at 196 F. 2d 424; Findings of Fact, Conclusions of Law, and Order of the Board (R. 71-114) are reported at 92 N. L. R. B. 1622.

JURISDICTION.

The judgment of the Court below was entered on April 29, 1952 (R. 128). A Petition for Rehearing, filed by the Company on May 6, 1952, was denied on June 18, 1952 (R. 129, 134). The Decree, detailing the terms of the judgment, was entered on July 8, 1952 (R. 135-136). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. 136. The Petition for Writ of Certiorari was granted on October 13, 1952 (R. 89).

STATUTE INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, 141, et seq.), are set forth in the Appendix to this Brief insofar as they are not set forth in the Appendix to the Petitioner's Brief (pp. 45-48).

ARGUMENT.

A. The Decree of the Court Below Will Result in a Calculation of "Back Pay" So as to Make the Employees "Whole" as the Terms Have Been Used and Interpreted Under the National Labor Relations Act Without Imposing a Penalty.

For a period of nearly 15 years from the first decision rendered by the National Labor Relations Board (In Re: **Penn. Greyhound Lines**, 1 N. L. R. B. 1), until 1950 (In Re: **F. W. Woolworth**, 90 N. L. R. B. 289), the Petitioner has followed in principle a specific formula for the computation of back pay under the National Labor Relations Act, both prior to and subsequent to the extensive amendments to the Act in 1947 (61 Stat. 1360, 29 U. S. C. Sup. U. 151, et seq.). During that period and as recently as January, 1951, from time to time various facets of that formula have been subjected to judicial review in this Court and in the Courts of Appeals. Such judicial review has resulted in modification as to application of various supplementary facets of the formula, but the basic concept of back pay computation has followed the statutory scheme of "making whole" through the medium of "back pay" based upon the difference between the amount the employee would have earned during the period between the time of his wrongful discharge and the time of the offer of reinstatement, less his net earnings during such period, and less such sums as he failed without excuse to earn.

By virtue of its decision in the **F. W. Woolworth** case (supra) the Petitioner has departed from the recognized and judicially approved formula and sought to impose a new concept of calculating back pay by the artificial method of treating each calendar quarter during the period between discharge and offer of reinstatement as a completely unrelated period insofar as other calendars are

concerned. By this formula Petitioner proposed to credit net earnings within this artificially selected calender quarter against what the employee actually earned during such quarter. If the net earnings are less, the employer must pay the difference. If they are more, the excess may not be credited against deficiencies in other quarters.

The Petitioner applied the new formula to this Respondent in its Order in this matter issued **January 26, 1951** (Tr. Vol. 1, pp. 38-42). When the matter came before the Court of Appeals for the Fifth Circuit, Respondent objected to the penal, rather than remedial, nature of the remedy proposed by the Board for computing back pay. The issue was briefed and argued to the Court of Appeals. The Court below in full accord with the pronouncements of this Court in **N. L. R. B. v. Guilett Gin Co.**, to wit:

> ". . . In effectuating the policies of the Act, the Board clearly may award back pay to discriminatorily discharged employees. This means that employees may be reimbursed for earnings lost by reason of the wrongful discharge, from which should be deducted net earnings of employees from other employment during the back pay period; Republic Steel case (U. S.), supra, and also sums which they failed without excuse to earn. Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177, 197, 198, 85 L. Ed. 1271, 1284, 1285, 61 S. Ct. 845, 133 A. L. R. 1217 . . ."
>
> **(N. L. R. B. v. Gullett Gin Co., 340 U. S. 361, 363, 95 L. Ed. 337, 341, 342.)**

And in the earlier **Republic Steel v. N. L. R. B** case, to wit:

> ". . . **The amounts earned** by the employees **before reinstatement were directed to be deducted from their back pay** manifestly **because, having already been received, these amounts were not needed to make the employees whole.** That principle would apply whether

the employees had earned the amounts in public or private employment . . ."

(**Republic Steel v. N. L. R. B.**, 311 U. S. 7, 9, 61 S. Ct. 77). (Emphasis supplied.)

denied enforcement of the Board's Order in this particular and embodied in its Decree a modification which reinstated the judicially approved former method of calculating back pay.[1]

The Court below concluded that the Record in this case was devoid of any facts or evidence which would justify adoption by the Board of a method of computing back pay which was designed to assess against this Respondent amounts in excess of the difference between the earnings the employees would have received and the amounts they had actually earned elsewhere. Contrary to the statement both in the Petition for Certiorari (p. 15) and in the Brief for Petitioner (Fn. 8, p. 34, Pet. Brief), a similar Decree was issued by the Circuit Court of Appeals for the Fifth Circuit in the matter of **Shell Oil Company v. N. L. R. B.**, 196 F. 2d 637 (June 17, 1952). Counsel for this Respondent was not counsel in that matter.

The facts in the Record before the Circuit Court of Appeals indicate that the Respondent's business is seasonal (Vol. III, page 4; App. to Res. Brief in the Court of Appeals). The so-called Woolworth Formula is even more clearly a penalty when applied to the peculiar facts of Respondent's business. Respondent operates a seasonal soft drink business in Miami, Florida. During the off-season employees earn what amounts to a sustaining wage only and the majority of their annual income is received

1 In **Social Security Board v. Nierotko**, 327 U. S. 358, at Fn. 4, p. 360, this Court noted that, according to the briefs of the Government, during the period 1939-1945 (war years and in a period of inflation) "more than 30,000 individuals were allowed 'back pay' in 'closed' cases by the National Labor Relations Board under 10 (c) . . . The aggregate in money exceeded $7,700,000 in the fiscal years 1939-1944 . . ."

during the season. The quarterly earnings of Respondent's employees might well be $4,800 a year represented by quarterly payments of:

	Estimated Earnings	Actual Earnings	Back Pay
1st	$1800	$1200	
2nd	600	1200	
3rd	600	1200	
4th	1800	1200	
	$4800	$4800	00

If the back pay claimant secured interim employment at a rate of $4800 per annum, and was paid at the rate of $400 per month, he would have suffered no loss and there would be no back pay due under the formula approved by this Court, and embodied in the Decree of the Court of Appeals for the Fifth Circuit.

Application of the Board's formula rejected by the Court of Appeals would result in back pay of $1200 to the employee irrespective of the fact that there has been no loss of earnings:

	Estimated Earnings	Actual Earnings	Back Pay
1st	$1800	$1200	$600
2nd	600	1200	
3rd	600	1200	
4th	1800	1200	600
			$1200

Ultimately the Petitioner argues that this Court should modify a determination of the Court of Appeals based on the evidence in the Record before that Court which the Court found to be insufficient to sustain the Board's radical departure from the judicially approved method of cal-

culating back pay.[2] The Court of Appeals found that the remedy sought by the Board would, on the basis of evidence before the Court, impose a penalty rather than a restoration of status quo ante, consequently the Court embodied the normal, approved method of calculation of back pay in its Decree. See footnote 10, p. 14, infra.

B. The Order of the National Labor Relations Board Prior to Its Modification by the Court Below Would Have Been Penal and Not Remedial.

It is substantially conceded by Petitioner in its Brief in Support of the Petition for Certiorari and in its Brief that the formula rejected in the instant case by the Court of Appeals will in every instance result in the employee's receiving all that he would have earned from the former employer. Moreover it appears that in most, if not all, instances the employee would receive amounts in excess of the difference between the amount he would have earned and the amount he actually earned during the entire period involved.

Such excess payment is a penalty and is designed as such. The language of the statute and judicial terminology used in its interpretation have uniformly expressed the Congressional intent to place the employee-discriminatee in status quo, to wit, "back pay," "reinstatement," "remedial," "make whole," "actual losses," "lost earnings," "sums he would have earned," and "restoration."

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2 ". . . Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. **Since only actual losses should be made good,** it seems fair that deductions should be made not only for actual earnings by the workers, but for losses which he wilfully incurred." (Emphasis supplied.)

(Phelps-Dodge v. N. L. R. B., 313 U. S. 177, 197, 198.)

"A back pay order is a reparation designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice."

(Nathanson v. N. L. R. B., . . U. S. . . ., 97 L. Ed., Adv. P. 15, Dec. Nov. 10, 1952.)

There is no statutory or judicial authority for the proposition that the National Labor Relations Board may issue punitive orders. There is substantial authority to the contrary.[3]

This Court has clearly indicated that an order making an employee more than "whole" would be "penal".[4]

Unlike the Fair Labor Standards Act involved in **Brooklyn Savings Bank v. O'Neil**, 324 U. S. 697, adverted to in Petitioner's Brief, the National Labor Relations Act does not contemplate or provide for penalties or liquidated damages. Absent statutory provisions therefor the Board may not impose penalties either to correct alleged social injustices arising under the Act, to avoid administrative difficulties or to speed up enforcement.[5]

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[3] **Republic Steel Co. v. N. L. R. B.**, 311 U. S. 7, 61 S. Ct. 77; **Phelps-Dodge Co. v. N. L. R. B.**, 313 U. S. 177, 61 S. Ct. 845; **Consolidated Edison Co. v. N. L. R. B.**, 305 U. S. 197, 235-6; **N. L. R. B. v. Fotill Products, Inc.**, 180 F. 2d 441, 444, 9th Cir.; **N. L. R. B. v. Marshall Field & Co.**, 129 F. 2d 169, 172, 7th Cir.; **Reliance Mfg. Co. v. N. L. R. B.**, 125 F. 2d 311, 316, 7th Cir.; **N. L. R. B. v. Greenbaum Tanning Co.**, 110 F. 2d 988, 989, 7th Cir. (1940).

[4] "This reimbursement order cannot be labeled 'penal' . . . This is not a case in which the Board has ordered the payment of sums to third parties, or has made employees more than whole . . . ."

(Virginia Electric & Power Co. v. N. L. R. B., 63 S. Ct. 1214, 1220, 319 U. S. 533, 544.)

[5] ". . . As the sole basis for the claim of authority to go further and to demand payments to governments, the Board relies on the language of Section 10 (c) which provides that if upon evidence the Board finds that the person against whom the complaint is lodged has engaged in an unfair labor practice, the Board shall issue an order . . . 'requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.'

"This language should be construed in harmony with the spirit and remedial purposes of the Act. **We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act.** We have said that **'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.'** We have said that the power to command affirmative action is remedial, not punitive. Consolidated Edison Company v. National Labor Relations Board, 305 U. S. 197, 235, 236, 59 S. Ct. 206, 219, 83 L. Ed. 126. See, also, National Labor Relations Board v. Pennsylvania Greyhound Lines, 305 U. S. 261, 267,

C. The Petitioner Seeks to Impose Upon Respondent Liability for Collateral Losses on the Part of the Employees, While Denying the Respondent Credit for Collateral Benefits.

In the matter of **N. L. R. B. v. Gullett Gin,** 340 U. S. 362, 95 L. Ed. 343, this Court rejected the contention of an employer that it was entitled to offset against back pay, ordered by the National Labor Relations Board, certain sums of money which the employees had received by way of unemployment compensation benefits, on the ground that these benefits were collateral benefits that the employees would normally not have received and which ultimately were chargeable against the employer as a result of affecting its experience rating.

> ". . . Since **no consideration** has been given or **should be given to collateral losses** in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received . . ." (Emphasis supplied.)
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> **(N. L. R. B. v. Gullett Gin Co., 95 L. Ed. 338, 341, 340 U. S. 361, 364);**
>
> See also N. L. R. B. v. Brashear Frt. Lines, 127 F. (2d) 198, 199-200, 6th Cir.

That principle is here applicable.

In support of its argument, that in spite of the **Gullett Gin** decision, supra, it may predicate a calculation of back pay upon a reimbursement of collateral losses the Petitioner

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268, 58 S. Ct. 571, 574, 575, 82 L. Ed. 831, 115 A. L. R. 307. We adhere to that construction.

"In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end . . ." (Emphasis supplied.)

(Republic Steel Co. v. N. L. R. B., 311 U. S. P. 7, 9, 61 S. Ct. 77, 78.)

cites the problem of crediting "quarters of coverage" to the employee under the Social Security Act. We submit that this Court in its decision in **Social Security Board v. Nierotko**, 327 U. S. 358, 90 L. Ed. 728, robbed that argument of validity. The Court held that back pay should be "allocated to the periods when regular wages were not paid," with full recognition that while this would entail accounting difficulties, such difficulties would not be "insuperable."[6]

D. The Petitioner Seeks Approval of the Right to Impose a Monetary Penalty Upon an Employer Who Avails Himself of His Statutory Right to Judicial Review Under Section 10 (E) and (F) of the National Labor Relations Act.

The underlying purpose and gravamen of the argument in Petitioner's Brief is that the so-called "Woolworth Formula" rightfully and properly assesses a penalty against employers who avail themselves of their statutory right to obtain judicial review of Orders of the National Labor Relations Board. The argument advanced by the Petitioner, in its Brief, is that the decision of the Court of Appeals for the Fifth Circuit should be reversed by this Court because this Respondent, and others similarly situated, may properly be penalized by it, because the delay incident to such judicial review constitutes a diminution of the authority or power of the Board and thereby im-

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6 "Petitioner further questions the validity of the decision of the Circuit Court of Appeals on the ground that it must be inferred from the opinion that the 'back pay' must be allocated as wages by the Board to the 'calendar quarters' of the year in which the money would have been earned, if the employee had not been wrongfully discharged. We think this inference is correct. This conclusion, petitioner argues, tends to show that 'back pay' cannot be wages because the Amendments of 1939 use 'quarters' as the basis for eligibility as well as the measure of benefits and require 'wages' to be 'paid' in certain 'quarters.'

"If, as we have held above, 'back pay' is to be treated as wages, we have no doubt that it should be allocated to the periods when the regular wages were not paid as usual. Admittedly there are accounting difficulties which the Board will be called upon to solve, but we do not believe they are insuperable."

(Social Security Board v. Nierotko, supra, at p. 370.)

pedes its enforcement of the Act. We respectfully submit that judicial review of Orders of the National Labor Relations Board has not been so completely fruitless and has not so uniformly resulted in enforcement of the decisions of the Board without modification as to enable the Board to properly characterize determinations to seek judicial review of Board Orders as dilatory tactics.

We submit that under our system of laws that it would be entirely inappropriate to have vested in one of the potential adversaries or litigants, under a statutory scheme which provides for judicial review, the power to penalize its adversary party for availing himself of his statutory right to obtain such judicial review. Nor would it be appropriate to vest an administrative agency with a weapon to use, in its discretion, to discourage the use of judicial review where such review is in contemplation under the statute. Even though there may be disagreements as to the appropriateness of such a course, the fact is inescapable that Congress did not intend to, and did not vest in the National Labor Relations Board the power or authority to penalize a Respondent because of, or to penalize a Respondent to prevent use of, its statutory right to judicial review of Board Orders, either by direct appeal or by resistance to Petitions for Enforcement.

The Orders of the National Labor Relations Board by express design of Congress, and not by inadvertence, are not self-enforcing. Enforcement is vested in the several Courts of Appeals. To uphold the imposition of, a penalty upon a Respondent who either seeks judicial review of an Order of an administrative agency or who resists enforcement for valid, to it, legal reasons; albeit not necessarily sustained by the Court of Appeals, would strike at the foundations of our judicial system, and defeat the express statutory right to judicial review.[7] Petitioner can cite no

[7] "Departments may not under the guise of construction restrict or enlarge the meaning of the Act."

(U. S. v. Missouri Pacific Ry., 218 U. S. 269, 280, 49 S. Ct. 133, 137.)

authority either by way of statute, or decisions, of this or any other Court (and we have found none), which support its attempt here to obtain approval of a formula designed to curtail, limit, or prohibit judicial review of its decisions through the medium of imposition of a financial penalty.

E. The Decree of the Court of Appeals Modifying the Board's Order Upon Which Enforcement Was Sought, So as to Conform It to the Evidence and the Applicable Law, Was an Appropriate Exercise of the Statutory Authority Vested in the Court Under Section 10 (e) of the National Labor Relations Act.

It may not properly be contended that the Court of Appeals by its Decree has failed to "guard against the danger of sliding . . . from the narrow confines of law into the more spacious domain of policy." It is inescapable that as of the time of the Petition for Enforcement to the Court of Appeals in this matter, that the Court of Appeals for the Fifth Circuit, the other Courts of Appeals, and this Court had had before them, on many occasions the question of construction of the provisions for "back pay" which have remained unchanged in the National Labor Relations Act since its passage in 1935. As a result thereof a virtually universal construction of the phrase, its meaning and operation had developed. This construction was both administrative and judicial. In the light of such uniform construction[8] the Court of Appeals examined the

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[8] ". . . This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board may be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive. Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 235, 236. . . . See also N. L. R. B. v. Pennsylvania Greyhound Lines, 303 U. S. 261, 267, 268. . . . We adhere to that construction . . .

"We think that affirmative action to 'effectuate the policies of this Act (chapter)' is action to achieve the remedial objectives which the Act sets

departure from the accepted construction of "back pay" as embodied in the Order of the Board upon which enforcement was sought, and as challenged by this Respondent. It reviewed the evidence in the Record. It heard the Petitioner's arguments that its proposed method of calculating "back pay" would only make the employees "whole." A review of the evidence by the Court of Appeals indicated that there was no evidence to support such contention by Petitioner. The Court of Appeals thereupon properly rejected the contention.[9] Moreover, it found that the facts in the Record supported a Decree embodying the normal method of calculating "back pay" as embodied in the administrative, as well as judicial,

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forth. Thus the employer may be required not only to end his unfair labor practices; he may also be directed affirmatively to recognize an organization which is found to be the duly chosen bargaining representative of his employees; he may be ordered to cease particular methods of interference, intimidation, or coercion, to stop recognizing and to disestablish a particular labor organization which he dominates or supports, to restore and make whole employees who have been discharged in violation of the Act, to give appropriate notice of his compliance with the Board's order, and otherwise to take such action as will assure to his employees the rights which the statute undertakes to safeguard. These are all remedial measures. To go further and require the employer to pay to governments what they have paid to employees for services rendered to them is an exaction neither to make the employees whole nor to assure that they can bargain collectively with the employer through representatives of their own choice. We find no warrant in the policies of the Act for such an exaction . . .

". . . All these measures related to the protection of the employees and the redress of their grievances, not to redress of any supposed public injury after the employees have been made secure in their right of collective bargaining and have been made whole.

This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board may be of the opinion that the policies of the Act might be effectuated by such an order . . .

(Republic Steel Corp. v. N. L. R. B., 311 U. S. 7, 11, 12, 13, 61 S. Ct. 77, 79, 80.)

See, also, Phelps-Dodge v. N. L. R. B., supra; N. L. R. B. v. Gullett Gin Co., supra, and Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197.

[9] Universal Camera v. N. L. R. B., 340 U. S. 474; Pittsburgh Steamship v. N. L. R. B., 180 F. 2d 731, 6th Cir., 340 U. S. 498; American National Insurance Co. v. N. L. R. B., 72 S. Ct. 824, 96 L. Ed. 721.

construction of the term as used in the National Labor Relations Act. It therefore appropriately embodied such construction in its Opinion and Decree.[10]

[10] . . . employees covered by the order of January 30, 1951, are entitled to reinstatement with back pay, but we differ with the Board as to the method of computation.

"Prior to its decision of June 12, 1950, in the **Woolworth** case, 90 N. L. R. B. 289, the Board awarded the employee a sum equal to what he would have normally earned over the entire period of suspension, less his actual net earnings in other employment during that entire period. Beginning with the **Woolworth** case, however, the Board requires back pay to be computed on a quarterly basis, each quarter standing upon a segregated basis. That method was ordered here.

"Respondent objects to the latter method, asserting that since excess earnings by the employee in one quarter do not operate to offset deficiencies in the earnings of another quarter, it would frequently result that the suspended employee would receive more in back pay, computed on that basis, than he would have earned in uninterrupted employment.

"The Board justifies its new method of computation upon the ground that employers have sometimes deliberately refrained from offering reinstatement to employees earning higher wages with another employer, because they knew that the greater the delay, the greater would be the reduction in their back pay liability. Thus, says the Board, a recalcitrant employer may profit by continuing to withhold reinstatement from a Union adherent who is then earning more with a new employer than he received from the old. Moreover, says the Board, suspended employees who are receiving higher pay from another employer, and who are therefore faced with the prospect of steadily diminishing back pay from their former employer, have thus been induced to waive their right to reinstatement in order to stop the running of back pay, and thus preserve the amount then owing them.

"Whatever method of computation is used, there will be occasional hardship cases one way or the other, but these exceptional cases should not determine the rule. The ordinary case should be the criterion. The employee is entitled to be made whole, but no more. The employees here involved were not compensated on a quarterly basis. We see no sufficient reason to so compute their back pay during suspension. When a hardship case arises, it can be decided on its own facts. It does not appear that these employees will not be made whole by computing their back pay continuously over the whole period of their suspension, the method followed by the Board itself prior to the **Woolworth** case. We hold such method, rather than the quarterly method, should be followed here. There is nothing to indicate that the conditions apprehended by the Board in the **Woolworth** case exist here.

"With that exception, the Board's order under consideration is Enforced."

(Volume I, Tr. pp. 75, 76; Original Print pp. 127, 128.)

196 F. (2d) 424, 427-8.

. . . (c) Make whole the employees whose names are set forth in 'Appendix A,' attached hereto, for any loss of pay each may have suffered as a result of the Respondent's discrimination against them, by payment to each of them of a sum of money equal to the amount which he normally would have earned from the date of the discrimination, September 16, 1948, to the date of the Respondent's offer of reinstatement, less his net earnings during said period;

(Volume I, Tr. p. 85; Original Print p. 137.)

In its Brief (page 31) Petitioner indulges in what it aptly characterizes as "word play" by the argument that the Court below in saying that the Board's (Woolworth) formula would "frequently result that the suspended employee would receive more in back pay than he would have earned in uninterrupted employment" infers that "back pay" is designed to bring to the discriminatee **exactly** the amount that he would have earned from the employer as "**back pay.**" What the discriminatee is entitled to is to be made whole in terms of **pay**. This Court, the Court below and the other Courts of Appeals, and the Board itself, have held that making "whole" contemplated that the employee would receive in "**pay**" as much money as he would have earned had he remained in the employ of the discharging employer; and that should the employee have received less in **pay** during the interim between discharge and offer of reinstatement (except where that receiving of less pay was due to his willful act), he shall be entitled to receive the difference between expected earnings and actual pay for the period in "**back pay**" in order that he be "made whole."

In the Phelps-Dodge case, supra, referred to in both the Petitioner's and this Brief, this Court has specifically pointed out that the remedy of reinstatement is completely independent of, and not contingent upon, the obligation to make whole from a monetary standpoint. Moreover, the Act under which the Board's Order was issued prescribes that reinstatement shall be ordered "with or without back pay." This Court in the Phelps-Dodge case held that under the National Labor Relations Act reinstatement may be ordered by the Board even though the discriminatee had obtained a full-time, more lucrative job, and even though the discriminatee was actually employed at such a job as of the time of the Board's Order at the time of a Decree of Enforcement.[11]

[11] "... The Board will thus have it within its power to avoid delays and difficulties incident to passing on remote and speculative claims by

In the Phelps-Dodge case this Court also held that the Board in calculating back pay could not ignore the "just doctrine of mitigation of damages" because of alleged administrative difficulty or in the interest of "avoiding the domain of controversy."[12]

The formula advocated by the Petitioner, in the Court of Appeals and in this Court, by Petitioner's own admission, impairs and disregards the concept of mitigation of damages. The flagrant disregard of the "socially desirable" and "just doctrine" of mitigation of damages in an effort to avert the remote contingency, not established in this Record, that the desire for greater financial return might conceivably cause an employee to waive his right to reinstatement is, we submit, both contrary to law and an abuse of discretion. As such it is "a patent attempt to achieve ends other than those fairly certain to effectuate the policies of the Act."[13]

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employees, while at the same time it may give appropriate weight to a clearly unjustifiable refusal to take desirable new employment. By leaving such an adjustment to the administrative process we have in mind not so much the minimization of damages as the healthy policy of promoting production and employment. This consideration in no way weakens the enforcement of the policies of the Act by exerting coercion against men who have been unfairly denied employment to take employment elsewhere and later, because of their new employment, declaring them barred from returning to the jobs of their choice. This is so because we hold that the power of ordering offers of employment rests with the Board even as to workers who have obtained equivalent employment. . . ."

(Phelps-Dodge v. N. L. R. B., supra, at pp. 199, 200.)

12 ". . . Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. **Since only actual losses should be made good,** it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred. To this the Board counters that to apply this abstractly just doctrine of mitigation of damages to the situations before it, often involving substantial numbers of workmen, would put on the Board details too burdensome for effective administration. Simplicity of administration is thus the justification for deducting only actual earnings and for avoiding the domain of controversy as to wages that might have been earned.

"But the **advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment.** The Board, we believe, overestimates administrative difficulties and underestimates administrative resourcefulness . . ." (Emphasis supplied.)

(Phelps-Dodge v. N. L. R. B., supra, at p. 854.)

13 Virginia Electric & Power Co. v. N. L. R. B., 319 U. S. 533, 540.

F. By Re-enacting Without Modification the Provisions of the Original Act Relating to "Back Pay" in the 1947 Amendments to the National Labor Relations Act, Congress Must Be Assumed to Have Accepted the Construction Placed Thereon by the Board and Approved by the Courts.

By re-enacting the language of Section 10 (c)[14] of the Act relating to "back pay" without modification Congress asserted its approval of the formula used by the National Labor Relations Board for computing back pay from the period 1935-1950 as affirmed with certain modifications by this Court and the Courts of Appeals.

The Petitioner argues (Pet. Brief p. 10 et seq.) that beginning in 1940 it observed that the formula being used by it for calculating back pay (beginning in 1935) was not yielding some of the results which the Petitioner apparently desired. In 1941 this Court in its decision in the Phelps-Dodge matter, supra, reviewed the entire question of the back pay formula and policies of the National Labor Relations Board and approved with certain modifications the various elements in the back pay formula which had been adopted and used by the Board since its inception.[15]

The Petitioner refers in its Brief to a staff memorandum issued by members of the Petitioner's staff in 1946 (Fns. 2 and 3, pp. 12, 13, Pet. Br.), which apparently further specified the allegedly unsatisfactory results growing out of the formula for the computation of back pay. These two dates (1940, 1946) are significant since in 1947 the National Labor Relations Act was substantially amended, revised, and in many particulars rewritten. Hearings before the 80th Congress on what ultimately came to be known as the "Taft-Hartley Act" were extensive during the early part of 1947. Representatives of the Petitioner

14 29 U. S. Supp. V, Sec. 160 (c).

15 Phelps-Dodge Corp. v. N. L. R. B., supra, at pp. 197-199, and Fn. 7, at p. 199.

were called upon to testify before members of Congress to present their views and suggestions as to revisions and proposals of the Act. There is no showing that Petitioner, or its representatives made any representations to any of the Committees of Congress in connection with the method of calculating back pay as embodied in 10 (c) of the Act. Nor was it submitted or suggested that Congress grant to the Board the power to assess liquidated damages (a power vested in the administrator of the Fair Labor Standards Act, see **Brooklyn Savings Bank v. O'Neil**, supra). We avert to the fact that these Congressional hearings occurred after the Petitioner noted in 1940 the alleged unsatisfactory results of its back pay formula; and, after the issuance of the staff memorandum in 1946 to the same general effect; and after the Courts, including this Court, had passed upon and affirmed with some modification the formula which had been adopted by the Board, and which had as of the time of the Congressional hearings in 1947 been in use for more than 10 years. The Congress in enacting the Taft-Hartley Act re-enacted the back pay provisions of the original Act. It used the identical language as to "back pay" in Sec. 10 (c) of the amended Act. We submit that Congress must be assumed to have been aware of the formula used by the Board for calculating back pay; and aware of the interpretations and decisions of this and several Courts of Appeals in connection with that formula. We submit that if Congress had any intention of modifying the formula or the judicial interpretations thereof, it would have done so. By "re-enacting [10 (c)] without pertinent modification . . . Congress accepted the construction placed thereon by the Board and approved by the Courts."[16]

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[16] ". . . Our holding is supported by the fact that when Congress amended the National Labor Relations Act in 1947, the Board had for many years been following the practice of disallowing deduction for collateral benefits such as unemployment compensation. During this period the Board's practice had been challenged before the courts in only two cases, and in both the Board's position was sustained. National La-

This quoted excerpt from the recent decision of this Court in the **Gullett Gin** case is, we submit, completely applicable to the case at bar.

CONCLUSION.

For the reasons stated above, it is respectfully submitted that the decision of the Court of Appeals below should be affirmed.

Respectfully submitted,

FRANK A. CONSTANGY,
MARION A. PROWELL,
1404 Candler Building,
Atlanta 3, Georgia,

ALBERT B. BERNSTEIN,
BERNSTEIN & HODSDON,
Seybold Building,
Miami, Florida,

Attorneys for Respondent, Seven-Up Bottling Company of Miami, Inc.

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bor Relations Board v. Marshall Field & Co. (C. A. 7th), 129 F. 2d 169, 144 A. L. R. 394; National Labor Relations Board v. Brashear Freight Lines (C. A. 8th), 127 F. 2d 198. In the course of adopting the 1947 amendments Congress considered in great detail the provisions of the earlier legislation as they had been applied by the Board.

"Under these circumstances it is a fair assumption that by re-enacting without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the Courts. See Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110, 114, 115, 83 L. Ed. 536, 540, 541, 59 S. Ct. 423; Brewster v. Gage, 280 U. S. 327, 337, 74 L. Ed. 457, 463, 50 S. Ct. 115; Norwegian Nitrogen Products Co. v. United States, 288 U. S. 284, 313-315, 77 L. Ed. 796, 806, 807, 53 S. Ct. 350. . . ."

N. L. R. B. v. Gullett Gin Co., supra, at pp. 365, 366.

APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151 et seq.), as further amended by Public Law 189, October 22, 1951 (82nd Cong., 1st Sess.), other than those set forth in the Appendix to Petitioner's Brief (pp. 45-48) are:

Section 9 (e)—"The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of Appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial

evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., Title 28, Secs. 346 and 347).

Section 9 (f)—"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon

the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under the subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence in the record considered as a whole shall in like manner be conclusive."